

CALIFORNIA COASTAL COMMISSION

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Th12a



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COASTAL DEVELOPMENT PERMIT AMENDMENT

Application number3-93-017-A2, Otter Rock Café Amendment

Applicant.....Josef Steinmann

Project location845 & 885 Embarcadero Road (Lease Sites 89, 89W, 90 & 90W), Morro Bay, San Luis Obispo County. Please see Exhibit 1

Project descriptionAfter the fact request to modify original permit to convert two observation decks previously approved as public access (875 square feet) to restaurant seating and to extinguish an approved 18' wide public vertical access running the length of the property from Embarcadero Road to the observation decks. In addition, the following new development is proposed: 1) construct 100 square feet of additional indoor dining space between the observation decks; 2) construct a new 8' wide lateral access along the entire bayfront with connection to adjacent property to the south; 3) remove existing gangplank and small floating dock (250 square feet); 4) construct 640 square foot floating dock 8' wide and in the approximate location of the existing dock; and 5) installation of 12 structural pilings within the bay to support the new dining, access, and dock structures.

Agency approvalsConditional approval of a Concept Plan for Conditional Use Permit CUP 28-02, City of Morro Bay, January 13, 2004; Conditional Use Permit CUP 16-92 Major Amendment, April 15, 1996; Conditional Use Permit CUP 16-92, April 5, 1993; Coastal Development Permit 3-93-017-A1, California Coastal Commission, April 13, 1994; Coastal Development Permit 3-93-017, California Coastal Commission, April 14, 1993; U.S. Army Corps of Engineers (ACOE) Provisional Conditional Permit (No. 200401846-HW) dated November 9, 2004.

File documents.....CCC Coastal Development Permit File 3-93-017-A2.

Staff recommendation ...Approval with Conditions



California Coastal Commission
January 13, 2005 Meeting in Long Beach

Staff: M. Watson Approved by:

Procedural Note

Coastal Development Permit Amendments

The Commission's regulations provide for referral of permit amendment requests to the Commission if:

1. The Executive Director determines that the proposed amendment is a material change,
2. Objection is made to the Executive Director's determination of immateriality, or
3. The proposed amendment affects conditions required for the purpose of protecting a coastal resource or coastal access.

If the applicant or objector so requests, the Commission shall make an independent determination as to whether the proposed amendment is material (14 California Administrative Code Section 13166).

The subject application is being forwarded to the Commission because the Executive Director has determined that the proposed amendment is a material change and affects conditions required for the purposes of protecting coastal resources or coastal access.

Summary of Staff Recommendation: The Applicant is seeking an after-the-fact amendment to coastal development permit 3-93-017 to convert two existing public observation decks to additional restaurant seating and extinguish the public vertical access through the property. In addition the applicant requests the following new development: 1) construct 100 square feet of additional indoor dining space to be added between the converted observation decks; 2) construct a new eight foot wide lateral public access boardwalk along the entire width of the lease site and seaward of the converted observation decks with a connection to the adjacent lease site to the south; 3) removal of existing gangplank and floating dock (240 square feet), 4) construct a new 8' wide floating dock approximately 640 square feet, and 5) installation of 12 new structural pilings within the bay to support the new dining, access, and dock structures. The proposed new project will encroach roughly 16 feet further into the Morro Bay than the existing development (8' for the public lateral access and 8' for the new floating dock, with an 8' undeveloped buffer between the two) and cover approximately 1,000 square feet of additional bay waters.

Coastal Development Permit 3-93-017 originally granted a prior property owner authority to demolish an existing 1,135 square foot marine and abalone hatching facility and construct a 1,950 square foot mixed use structure. This structure includes 975 square feet for commercial retail use and 975 square feet for a take-out restaurant with outdoor dining. The permit also included an 18' wide vertical access and view corridor from Embarcadero Road through the property and two (2) public access observation decks overlooking Morro Bay. Glass enclosures were approved around the observation decks for wind protection. The vertical access was designed as a breezeway through the proposed development (i.e., it had a roof and side walls but was open along the Embarcadero Road elevation to promote access). In April 1994, no objection was received on an immaterial amendment (3-93-017-A1) to construct a glass



enclosure at the vertical access entrance (i.e., Embarcadero Road) to provide wind protection and to erect signing identifying the entrance as a public vertical access point to the observation decks. The Commission's action on the permits found that construction of the vertical access/view corridor and the public observation decks were adequate to satisfy the access provisions of the City's certified LCP and Chapter 3 of the Coastal Act. Please see Exhibit 7.

In April 1996, the City of Morro Bay approved a major amendment to the original permit (CUP 16-92), granting approval for extinguishing the vertical access through the property and for converting the public observation decks to additional outdoor restaurant seating. As a condition of the City's permit, the permittees were required to obtain all necessary approvals including any coastal development permit or permit amendments from the Coastal Commission. After a flurry of correspondence with the prior leaseholders, the Commission's Enforcement Division opened a violation case and recommended that an application for an after-the-fact coastal development permit or permit amendment be submitted to resolve the violations. The prior leaseholders refused to submit the after-the-fact coastal development permit (CDP) or a CDP amendment application and thus the violation has been unresolved for several years. After discussion with Commission staff, the current lease holder (Applicant) has agreed to address and resolve the violations within the context of this coastal development permit amendment.

The proposed development is located primarily on lease sites 90 & 90 West, located between the first public road (Embarcadero Rd.) and the bay. A significant portion of the proposed development would occur over or in bay waters. Sensitive marine resources found in the area include marine mammals and birds, which are located in, or nearby, areas proposed for construction activity. Otters and pelicans can be impacted by noise or construction activity. Additionally, a significant amount of eelgrass (172 square feet) was detected on the lease site seaward of the existing development. Eelgrass is considered Essential Fish Habitat for federally managed marine and anadromous fish species. Installation of pilings and construction of docks and boardwalks can impact the ability of eelgrass to colonize and grow. Though the City's approval requires annual monitoring of the eelgrass beds for any associated impacts following construction, it does not propose mitigation measures to avoid habitat disruption or minimize impacts during construction. Furthermore, the compensatory mitigation required by the City's for direct impacts associated with the development is inadequate. No mitigating measures are proposed to protect marine mammals or birds during construction.

Structural pilings for the proposed public lateral access and new floating dock will be steel-pipe capped and will be driven into the ocean floor to minimize disturbance of benthic organisms. Disturbed sediments will be contained with a flexible skirt surrounding the driven pile. Additionally, material containment measures are proposed to prevent foreign materials (e.g., construction scraps, wood preservatives, concrete, and chemicals, etc.) from entering the harbor and state waters. A construction staging site located near Embarcadero Drive is required to reduce the potential for inadvertent release of fuel, oil, or other construction materials into coastal waters. Brooms, drop cloths, and other absorbent materials are required to be stored on site in order to facilitate clean up and timely response to unplanned hydrocarbon spills.

With respect to the proposed new fill in the bay, the Coastal Act does not provide for the placement of



fill for new or an expansion of commercial visitor-serving uses but does make an allowance for public access piers and boating facilities provided that adverse impacts have been avoided and/or mitigated. Neither the proposed public lateral access boardwalk nor the proposed floating dock includes feasible mitigation measures to minimize adverse environmental impacts.

As noted above, the proposed amendment request is partially for an after-the-fact permit amendment to convert the existing public observation decks to restaurant use and to extinguish the previously acquired public vertical access through the property. Alternative public vertical access to the shoreline exists within 100' of the Otter Rock Café entrance. The applicant is proposing that in exchange for the change in use (i.e., conversion of decking), an 8' wide public lateral access boardwalk with a connection to the adjoining southern property be dedicated and constructed. As is currently permitted, public access to the observation decks overlooking the bay at this location can only be gained through the vertical access breezeway from Embarcadero Road. The original Commission permit approval did not include a requirement for lateral access connections to adjoining properties and thus, the amendment represents an opportunity to further the City's and statewide goals of providing a continuous public lateral access boardwalk along the entire waterfront –the preferred alignment for the California Coastal Trail through Morro Bay. Again, vertical access exists nearby and with the completion of lateral access path connecting to adjoining properties, pedestrians will be able to gain access to and stroll along a significant stretch of continuous lateral access along the Morro Bay waterfront. Since the applicant proposed the access improvements, the City did not condition its approval (CUP 28-02) to require lateral public access. However, staff notes that a condition is necessary to ensure that the access improvements are constructed, signed, and made available for pedestrian access and general public use 24 hours per day, 365 days per year for the life of the amended project.

Notwithstanding the proposed improvements and the special conditions placed on the conditional approval of the City, additional measures are necessary to ensure the project will be consistent with the coastal resource protection and public access policies of the Coastal Act. Staff therefore recommends that the Commission approve a revised project with conditions requiring the Applicant to provide Revised Plans, Marine Mammal and Eelgrass Mitigation Measures, Public Access, and future Shoreline Development Stipulations. These conditions maximize the project's conformance to the coastal access and resource protection policies of the Coastal Act by requiring:

- Revised Plans that identify the number and location of structural pilings to be placed in estuary waters; limit commercial development to its existing footprint as shown in Exhibit 2; show an eight foot lateral access boardwalk along the entire bay frontage with lateral connections to adjacent properties; a 4' wide floating dock; and submittal of plans for signing and railings;
- Construction of an eight foot wide lateral public access boardwalk along the entire 50' width of bay frontage with connections to both adjoining properties (Galley Restaurant and the Boatyard; access shall be open and available for pedestrian and general public use 24 hours each day, 365 days a year for the life of the development;
- Installation of transparent grid decking surfaces for the lateral access boardwalk to promote light



penetration and reduce loss of eelgrass due to shading impacts;

- Reduction in the width of the floating dock to 4' and re-locate the dock to the western lease-site boundary;
- Ongoing monitoring of lease site area for eelgrass impacts; require development and implementation of mitigation plan if impacts are discovered; Applicant must participate in coordinated mitigation effort with Harbor District, National Estuary Program, National Marine Fisheries Service.
- A limit on future development seaward of the approved development.

Staff Note: The original application included a request for an outdoor dining patio extension over the bay. The applicant has subsequently withdrew the request for the patio extension and modified their request to include enclosure of the area between the two observation decks (~100 square feet) for additional café seating and also to resolve the ongoing Coastal Act violations related to the intensification of use on the site without the proper permits. The revised changes will have less impact on marine resources by eliminating development directly over the existing eelgrass beds and also result in less fill by necessitating fewer structural pilings to be placed within bay waters. The changes are discussed in detail in the Staff Report findings below.

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- Exhibit 2: Revised Project Plans per Special Condition 2
- Exhibit 3: City Staff Report Findings and Conditions (CUP 28-02)
- Exhibit 4: Proposed Site Plan and Foundation Plan
- Exhibit 5: Eelgrass Survey, Tenera Environmental (August 16, 2004)
- Exhibit 6: Photograph
- Exhibit 7: Original Coastal Development Permit 3-93-017

I. Staff Recommendation on Amendment

The staff recommends that the Commission, after public hearing, **approve** the proposed amendment subject to the standard and special conditions below. Staff recommends a **YES** vote on the following motion:

Motion. *I move that the Commission approve the proposed amendment to Coastal Development Permit Number 3-93-017-A2 pursuant to the staff recommendation.*

Staff Recommendation of Approval. *Staff recommends a YES vote. Passage of this motion will result in approval of the amendment as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.*

Resolution to Approve a Coastal Development Permit Amendment. *The Commission hereby approves the coastal development permit amendment on the grounds that the development as amended and subject to conditions, will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit amendment complies with the California Environmental Quality Act because either: (1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment; or (2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse effects of the amended development on the environment.*

II. Conditions of Approval

A. Standard Conditions

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner



and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

B. Special Conditions

1. **Biological Monitor.** All work that disturbs the ocean floor (i.e., installation of pilings) shall be monitored by the project biologist to ensure that impacts to marine mammals are avoided. A U.S. Fish and Wildlife Service-approved biological monitor shall be present on site during construction and shall have the authority to stop construction if any individuals of southern sea otter are seen within 100 feet of the project area. Construction will be allowed to resume after sighted otters have left the 100-foot radius of the project area. The monitor will have discretionary authority to temporarily halt the project if it is determined that the otter could be affected by the project even if the otter is beyond the 100-foot boundary. All construction crew employees shall be informed on the requirements of this condition.
2. **Final Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, permittee shall submit final plans to the Executive Director for review and approval, which shall be revised and supplemented to show all components of project including:
 - a. All buildings and structures shown in site plan view. The existing restaurant and converted observation decks shall not be extended further seaward than the existing footprint. Plans shall indicate that the area between the two observation decks shall be enclosed and converted to café dining space. Plans shall also indicate a 8' wide public lateral access with connections to both adjoining properties and an expanded floating dock, 4 feet in width, located to the seaward extent of the lease site as shown in Exhibit 2.
 - b. Number and location of structural pilings in site plan view, necessary to support the approved new floating dock. The number of pilings shall be limited to the minimum necessary to found the dock facility. The plan shall provide details on the floating dock structure and shall include all reference points such as lease site boundaries, top of bulkhead, approximate waterline, location of eelgrass, buildings, etc.;
 - c. All primary building elevations; Final plans shall include at least one illustration of each



primary elevation (i.e., North, East, South, and West);

- d. An 8' wide public access boardwalk along the entire 50' width of the lease site. In addition, final plans shall indicate lateral access connections to adjoining properties (i.e., Galley Restaurant & the Boatyard). The lateral access boardwalk shall be cantilevered over the bay.

3. Eelgrass Mitigation and Monitoring. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for Executive Director review and approval, the following eelgrass mitigation and monitoring plan that provides:

- a. Alternative construction materials. Alternative construction materials (e.g., fiberglass grid deck surfacing) shall be used as decking for the lateral public access boardwalk to allow sunlight to penetrate and reduce shading of potential eelgrass habitat. Choice of materials shall be based on the decking product that provides optimum light penetration and shall be accompanied by all methods, analysis, and supporting documentation demonstrating that it is the best available technology.
- b. Annual Surveys. WITHIN 30 DAYS OF COMPLETION OF CONSTRUCTION OF THE PUBLIC ACCESS BOARDWALK AND ONCE PER YEAR FOR TWO YEARS THEREAFTER, the permittee shall cause an annual survey to be completed by a qualified biologist that will monitor the location and extent of eelgrass beds below and adjacent to the project. The survey shall include a map and written description of the status of eelgrass growing on site and/or an evaluation of the cause of any identified reduction in eelgrass habitat. Surveys shall be submitted to the Executive Director within 30 days of completion for review and evaluation. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game.
- c. Mitigation. WITHIN THREE YEARS AFTER COMPLETION OF CONSTRUCTION OF THE PUBLIC ACCESS BOARDWALK, If monitoring finds that 10% or more of the eelgrass beds have been adversely affected by the project, permittee shall develop and implement a plan, subject to Executive Director review and approval that provides for corrective mitigation measures. Mitigation measures may include replacement of eelgrass onsite or contributing to a pilot project for planting of eelgrass beds in a new location including within or adjacent to the City's Mooring Area 1 eelgrass site, in coordination with the Harbor District, National Estuary Program, Department of Fish and Game, or National Marine Fisheries Service (NMFS). If coordinated corrective mitigation is not possible, the Permittee shall be required to provide individual compensatory mitigation within Morro Bay consistent with NMFS Southern California Eelgrass Mitigation Policy. The Plan shall include at a minimum the location and amount of mitigation, techniques used for planting, timing, monitoring, and minimum success criteria.



- 4. Public Access.** WITHIN 180 DAYS OF THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall ensure the public access components are constructed in conformance with the approved final plans, and all facilities are open to the public thereafter for the life of the project. Additionally:
- a. **Public Access.** The entire eight (8) foot width of the lateral access boardwalk and all access connections to adjoining properties, docks, decks, etc., shall be open and available for lateral pedestrian access and general public use 24 hours a day, 365 days a year, for the life of the development.
 - b. **Lateral Access Connections.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for Executive Director review and approval, plans to connect the lateral public access boardwalk located along the waterfront, by a ramp, deck or other, to adjacent lateral and/or vertical access points in order to provide continuous public access to and along the public access waterfront boardwalk.
 - c. **Railing Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for Executive Director review and approval, plans that show the proposed railings to be used on public access walkway. Railings shall be designed to maximize views (e.g., using vertical railings spaced sufficiently apart) to allow views of harbor, ocean and dunes across wharf while maintaining pedestrian safety.
 - d. **Signage Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for Executive Director review and approval, signage plans. Plans shall identify the location, design and content of any signs and interpretive displays used for illustrative, educational or directional purposes. Signs should be kept relatively small in size, designed in keeping with the maritime character of the area, and placed in locations that avoid disruption of scenic coastal views. Signs should clearly identify that public coastal access is available.
- 5. Shoreline Development Stipulations.** By acceptance of this permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns that:
- a. **No Further Seaward Encroachment.** No further seaward encroachments by development is permitted on this site.
 - b. **Assumption of Risk, Waiver of Liability and Indemnity Agreement.** The Permittee acknowledges and agrees, on behalf of itself and all successors and assigns: (i) that the site is subject to hazards from episodic and long-term bluff retreat and coastal erosion, tidal scour, wave and storm events, bluff and other geologic instability, and the interaction of same; (ii) to assume the risks to the Permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; (iv) to indemnify and hold



harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards; and (v) that any adverse effects to property caused by the permitted project shall be fully the responsibility of the property owner.

6. **Condition Compliance.** WITHIN 180 DAYS OF THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, or within such time as the Executive Director may grant for good cause, the applicant shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to issuance of this permit. Failure to comply with this requirement may result in the institution of action to enforce those conditions under the provisions of Chapter 9 of the Coastal Act.
7. **Compliance with Local Conditions of Approval.** Standard and Special Conditions 1, 2, 11, 15, 16, 17, and 19 required by the City of Morro Bay Conditional Use Permit 28-02 are hereby incorporated as conditions of this permit. (See Exhibit 3 of this report for a copy of the local conditions of approval). Any revision or amendment of these adopted conditions and mitigation measures shall not be effective until reviewed by the Executive Director for determination of materiality, and if found material, approved by the Commission as an amendment to this coastal development permit.
8. **Revisions and Amendments.** The Permittee shall undertake development in accordance with the approved final plans identified in Special Conditions 1 - 3. Any proposed changes to the approved final plans (including any changes in building design, public access walks, construction materials or methodology) shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that the change is immaterial or that no amendment is necessary.

III. Recommended Findings and Declarations

The Commission finds and declares as follows:

A. Project Background

1. Project Location

Until the mid-1940's, the planning area known as the Embarcadero was relatively undeveloped. Most of the small community of Morro Bay was built on the bluff tops above the tidal flats. During this time, the Department of the Navy initiated a project to construct an amphibious base in Morro Bay. Between 1942 and 1945, the north and south breakwaters at the entrance to the harbor, the two T-piers, and the inner harbor revetment (i.e., bulkhead) were constructed. The existing navigational channel was dredged and the spoils deposited behind the inner harbor revetment to create the *fill* along the Embarcadero. In



the late 1940's the Navy base including all waterfront facilities were sold to the County of San Luis Obispo. Buildings began to be constructed on the Embarcadero and various docks and T-piers were occupied by a growing fleet of commercial fishing boats. In 1964, the City of Morro Bay incorporated and assumed jurisdiction over the County's waterfront land and facilities. Trusteeship of the state granted tidelands was also transferred to the City at that time.

The 7,200 square foot site that is the subject of this permit is located on the bayside of the Embarcadero in Morro Bay. (Please see Exhibit 1) Morro Bay and the Embarcadero in particular has become *the* major tourist attraction of the community and a prime coastal visitor-serving destination with an estimated 1.5 million visitors annually. The Embarcadero is now largely developed with a variety of visitor serving (restaurants, gift shops) and coastal related (kayak rental, commercial and recreational fishing services, and icing facilities etc.) land uses. Parcels on the bayside of Embarcadero are leased out to individual lessees by the City that controls these properties through a grant from the State Lands Commission.

2. Permit/Project History

In April 1993, the Coastal Commission approved, with conditions, Coastal Development Permit 3-93-017, which authorized the demolition of an existing marine and abalone facility and construction of a 975 square foot café with outdoor seating and 975 square foot retail shop, mixed use building. Also authorized was the construction of an 18' wide covered vertical access corridor from Embarcadero Road and 2 semi-enclosed public observation decks overlooking Morro Bay. Access to the observation decks is gained along the north side of the site and through the outdoor eating area via the vertical access corridor. Special conditions of the permit were limited to a requirement for public access signing and evidence that the applicant had satisfied the City's parking requirements. The Commission found that as conditioned, and with the proposed public access improvements, the project conformed to the Chapter 3 policies of the Coastal Act. Please see Exhibit 7.

In April 1994, no objection was raised on proposed amendment 3-93-017-A1 authorizing the installation of glass doors at the Embarcadero Road entrance to the vertical access corridor for wind and thermal protection. In the permit amendment findings, the Executive Director determined that the amendment was "immaterial" because public access would not be impeded since the doors would be non-locking and coastal access signage would be installed on the doors. There were no other adverse impacts to coastal resources identified.

One year later, on June 16, 1995, a letter from Commission staff was sent to the previous owners of the Otter Rock Café noting that there was a probable violation of the terms of CDP 3-93-017. In that letter, the prior owners were notified that the intensification of use of the site had resulted in a reduction of the required public access and therefore was inconsistent with the terms of the original coastal development permit. According to the then owner of the Otter Rock Café, business at the take-out restaurant had been better than anticipated and more space was needed to handle the demand for seating during business hours. Additional tables and chairs were placed into the public observation decks and the outdoor seating capacity was expanded from roughly 25 persons to 50. Locks were installed in the glass door



entrance to the vertical access corridor that led to the outdoor café and public observation decks. Public access signing was never installed at the vertical access entrance and the doors to the vertical access corridor were locked during non-business hours. The permit holder was notified that until the Commission authorizes the proposed intensification of use, it was their responsibility to abide by the requirements and conditions of the original coastal development permit. A CDP amendment application was sent as a courtesy and a date certain was set for August 15, 1995 by which time the amendment application was to be returned to avoid a formal violation being opened. The deadline passed without an amendment application being received. On September 7, 1995, a Notice of Violation of the Coastal Act was sent to the prior owners indicating that a formal violation case had been opened by the Commission's Enforcement staff.

The prior owners submitted an application to the City of Morro Bay in November 1995, to convert the use of the public observation decks to outdoor dining, extinguish the vertical access corridor required by the Commission issued permit, and allow the entrance doors to be locked during non-business hours. The City approved with conditions the application for a major amendment CUP 16-92 on April 16, 1996. The City's approval was subject to conditions that required the applicant to obtain Coastal Commission approval and to mitigate for the loss in public access by agreeing to construct an 8' wide lateral access deck across the bayside of the development within two years of completion of any adjoining lateral access at either neighboring site. There is no evidence that a CDP amendment application was ever submitted to the Commission for consideration between April 1996 and May 2004.

The current project applicant, Josef Steinmann, assumed the lease for the Otter Rock Cafe located at 885 Embarcadero Road (lease sites 90 & 90 west) on July 20, 2001. Soon thereafter, an application was submitted to the City of Morro Bay (CUP 28-02) for improvements to the Café and waterfront amenities. Those improvements included retaining the converted observation decks as outdoor seating for the Otter Rock Café, a 442 square foot outdoor dining patio, an 8' wide lateral public access walkway with connection to the adjoining property to the south, removal of the existing small private boat dock with gangplank, and a new 8' wide floating dock for recreational boat use. The City approved the conditional use permit with special conditions and directed the Applicant to submit an application to the Commission for a Coastal Development Permit amendment. An application for a CDP was received in the Commission's Central Coast Office on May 21, 2004. Staff discussed with the Applicant's agent the issues regarding the unresolved Coastal Act violation at this site and recommended that they be addressed and resolved within the context of this permit amendment. The Applicant has agreed to proceed in this manner and those issues are more fully developed in the findings below.

3. Proposed Amendment

The proposed amendment consists of two parts. The first part is for after-the-fact approval of the deck conversions and elimination of the vertical access corridor to resolve the outstanding Coastal Act violations of the original coastal development permit (3-93-017). As noted above, the changes in use were implemented by the prior leaseholder in the mid to late 1990's. The new leaseholder (applicant) is now seeking Commission approval to retain those changes in use including converting the 875 square



foot public observation decks to permanent outdoor dining for the Otter Rock Café. The applicant is also requesting that the 18' wide public vertical access through the property be extinguished.

The second part of the amendment includes the following new development: 1) construction of 100 square feet of additional indoor dining space between of the observation decks, 2) construction of a new 8' wide raised lateral access walkway along the entire bayfront with a connection to the adjoining property to the south, 3) removal of the existing gangplank and small floating dock, 4) construction of a new 8' wide floating dock in the approximate location of the existing dock, and 5) installation of 12 structural piling within the bay to support the new dining, access, and dock structures. See Exhibit 4.

B.Coastal Development Permit Determination

1. Fill of Open Coastal Waters

Section 30233 of the Coastal Act allows for fill of open coastal waters and estuaries for the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. The Coastal Act allows such activities where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects.

a. Policies

Coastal Act Section 30233 provides in part that:

Section 30233.

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

...(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

In addition, the following complementary Coastal Act Section applies:

Section 30231

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff,



preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

b. Analysis of Proposed Project

As described above, the project involves fill in the Morro Bay estuary to construct a public lateral access boardwalk that will provide an important link in the plan for continuous shorefront lateral access along the Embarcadero and an expanded floating dock. As proposed, the project requires installation of 12 new pilings in the intertidal mudflats seaward of the inner harbor revetment (i.e., bulkhead).

The applicant has proposed Best Management Practices (BMPs) and mitigation measures regarding material containment, installation procedures, construction staging, and debris disposal to prevent fouling of coastal waters. Pilings will be constructed of steel and steel-capped pilings driven into place with a pile driver. A flexible skirt will be used to contain disturbed sediments during installation. Heavy-duty netting will be installed beneath all work areas to collect construction discards and a floating containment boom will be placed into the bay to capture all debris that falls into the water. Netting and boom will be cleaned daily or as often as necessary to prevent accumulation of debris. All wastes will be disposed of in the appropriate manner. The applicant's proposed BMPs are very similar to those used by the Commission and are adequate to satisfy the requirements of Coastal Act Section 30231. In addition, the City of Morro Bay imposed special conditions on its permit to control release of sediments, trash/debris, and other hazardous materials from entering coastal waters. Special Condition 7 requires that all special conditions of the City's permit be incorporated into the conditions and requirements of this Coastal Development Permit.

With respect to the proposed new fill in the bay, Coastal Act Section 30233(a)(4) limits the placement of fill (i.e., structural pilings) to only a few specified uses, two of those uses are for expanded boating facilities and public recreational piers that provide public access and recreational opportunities. The applicants originally proposed to install 16 pilings to support the new outdoor patio, access and expanded boating facilities, but subsequently revised their project description and reduced the number of required pilings to a maximum of 12. The new number of pilings reflects the reduction in the project by eliminating the proposed outdoor dining patio. However, it is possible the number of pilings may be further reduced. The foundation for the lateral access can be constructed by extending the existing structural ledgers already in place, without the need for additional structural pilings. The applicants have proposed installing pilings in the water near the location of the floating dock with grade beams that extend back to the existing development. The floating dock would tie-up to the pilings and the public lateral access would be constructed on top of the grade beams. This alternative would leave exposed grade beams in the area between the lateral access and floating dock. Structural pilings cannot be installed directly beneath the public lateral access because they would run into the existing shoreline revetment, which slopes down beneath the tidal mudflat. Additional impacts to the eelgrass beds would also likely occur.



As mentioned above, coastal Act section 30233 allows placement of fill in coastal waters for public access and expanded boating facilities, *only* when there is no feasible less environmentally damaging alternative and where feasible mitigation measures have been provided to minimize adverse impacts. As revised by the applicant, the proposed project no longer includes a request for an expanded outdoor dining patio and thus, will not involve fill to expand commercial facilities. However, the proposed foundation plan may still result in unintended visual and marine resource impacts. The emplacement of pilings and structural grade beams could lead to direct impacts (i.e., habitat disruption) and indirect (i.e., shading) impacts of the identified eelgrass beds. Furthermore, the exposed grade beams will result in a visual degradation of the area between the public lateral access deck and the floating dock. As a consequence, the proposed revised foundation plan cannot be considered the least environmentally damaging feasible alternative and therefore is not consistent with section 30233 of the Coastal Act.

To bring the project into conformance with section 30233, Special Condition 2d requires the applicant to submit revised plans that show a public lateral access, 8' in width and cantilevered over the bay, with no additional pilings placed in coastal waters for support. The proposed grade beams shall be removed from the project plans. This will avoid any unintended impacts to marine resources and eliminate unsightly visual impacts.

Additionally, as is discussed more thoroughly in the Marine Resource section below, in order to avoid impacts to the identified eelgrass beds, the requested new floating dock is recommended to be reduced in size and relocated further offshore. However, since there is no recommendation on the specific number or placement of the structural pilings, a Special Condition is required to identify the number and precise location of the new pilings in site plan view on the lease sites. The number of pilings is restricted to the minimum necessary to support the new floating dock and structural pilings are required to be spaced as far apart as practicable to prevent/minimize impacts to potential eelgrass habitat.

d. Conclusion

As conditioned to include the City's conditions of approval as part of the Commission's action on the permit, the biological productivity of coastal waters will be protected and maintained. Also, as conditioned to require the public lateral access be cantilevered over the bay and the number of new pilings reduced to the minimum necessary to support the floating dock, the project conforms to the standards for fill of open coastal waters included in Section 30233 of the Coastal Act.

2. Marine Resources

a. Issue

The project involves construction, demolition, and filling activities in the Morro Bay estuary that may result in adverse environmental impacts to marine resources, as well as adversely affect water quality. The project involves the removal of an existing floating dock and gangplank in and over open coastal waters. It also includes construction of an expanded commercial retail/visitor-serving mixed-use building, a new public access boardwalk, and a new floating dock, all of which involves installation of 16 steel pilings directly in the Morro Bay estuary.



b. Policy

Coastal Act Section 30230 requires that:

Section 30230. Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

c. Analysis of Marine Resources and Essential Fish Habitats

Morro Bay is a small estuary of 2,300 acres and is fed by Chorro and Los Osos Creeks, and is protected from the Pacific Ocean by a lengthy sand spit. The estuary is a nursery for many species of invertebrates and fish –some that live as adults in the ocean. The shallow water, eelgrass beds and wetlands provide protected habitat and rich food sources for birds, larvae, and fry. Marine mammals, invertebrates, fish, and seabirds make use of both the aquatic and terrestrial environments provided within the bay.

Though the central and southern portion of the bay still contain fairly large, intact, and thriving eelgrass beds, the main harbor area adjacent to the proposed development site has undergone significant changes that have altered the condition and extent of eelgrass at this location. In addition, development along the Embarcadero has resulted in changes to the historic extent of eelgrass along these shores. The waterfront area has been heavily used by commercial and recreational fishing boats since the opening of the harbor in the mid 1940's. As a result, much of the fringing eelgrass beds and benthic environments that once existed have become fragmented and only remnant patches of eelgrass beds exist in areas where favorable ambient conditions prevail to support growth. Eelgrass thrives in a very narrow range of environmental conditions including shallow water with minimal turbidity and a mud or sandy substrate with good exposure to sunlight (i.e., minimal shading). A good example of this are the healthy eelgrass beds at the north end of the harbor adjacent to the Duke Energy intake. At this location, there is little development or disturbance of the shallow (i.e., less than 10') intertidal area. Accordingly, water clarity is good and adequate sunlight is available to support colonization and retention of eelgrass. In many instances around the harbor, structures such as buildings, piers, and docks have encroached into this shallow intertidal zone and the eelgrass has retreated.

Birds and Marine Mammals. Marine mammals that have been found in the project area include the Pacific harbor seal (*Phoco vitulina*) and the threatened California sea otter (*Enhydra lutris*). California brown pelicans (*Pelecanus occidentalis californicus*) have also been observed in and around Morro Bay, the harbor, and the project site. Seals and otters feed on fish, clams, worms and other larger invertebrates throughout the estuary.

Typically, short-term noise impacts associated with construction activities are restricted to daylight hours and are not viewed as significantly impacting the physical environment. However, disturbing animals that are listed under the Endangered Species Act or Marine Mammal Protection Act may constitute harassment. The City's conditional use permit included a special condition that requires all



trash on site to be placed into covered trash receptacles to discourage wildlife foraging but did not adequately address the issue of potential adverse impacts associated with construction activities. Thus, to mitigate for any impacts, the Commission recommends Special Condition number 1 that requires an environmental monitor be committed to being on the job site at all times during which the pile driver is in operation. The environmental monitor will have the authority to halt any action that might result in injury or mortality of such wildlife, and will have the authority to employ non-invasive methods to discourage such animals from the area using methods approved by CDFG and USFWS (such as use of hand waving, hand clapping, herding boards, or water hoses). The “otter monitor” will determine when it is safe to resume work after the mammal has left the area. As conditioned, construction of the proposed development will not adversely impact birds and marine mammals and is therefore consistent with Coastal Act Section 30230.

Eelgrass Beds. As shown on Exhibit 5, two significant patches of eelgrass totaling 16m² (175 square feet) in area coverage is growing generally west of the revetment slope that would be covered by the proposed dining expansion and public access boardwalk. On average, strands of eelgrass were growing in water that ranged between 3’ and 9’ in depth and consisted of 133 stems per square meter. The two patches of eelgrass are separated by the existing floating dock and gangplank. Shading underneath these structures is believed to be responsible for the paucity of growth directly beneath them. No eelgrass was found in the project area further offshore on the sand-mudflat (i.e., in deeper water). A single 0.75m² (8 square feet) patch of eelgrass was identified outside the project area on the mudflat in front of the Galley Restaurant. If approved, the proposed public lateral access boardwalk and floating dock would be constructed over the entire mudflat area directly adjacent to the identified eelgrass beds. The eelgrass beds in the project vicinity would likely be impacted by construction activities and/or by the shading of sunlight created by the new development.

Eelgrass (*Zostera marina*) is a marine plant that grows in clear, well-lit, shallow coastal waters and provides shelter and spawning habitat for fish and invertebrates. It is widely recognized as one of the most productive and valuable habitats in shallow marine environments. The 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act set forth the Essential fish Habitat (EFH) provisions to identify and protect important habitats of federally managed marine and anadromous fish species. Eelgrass beds are considered a Special Aquatic Site (SAS) by the U.S. Army Corps of Engineers, California Department of Fish & Game, U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Eelgrass habitat is regulated under Section 404 of the Clean Water Act and is considered Essential Fish Habitat by the National Marine Fisheries Service.

The proposed project includes expanding the existing development footprint further seaward than its current position to accommodate the public lateral access boardwalk and floating dock. This expansion includes an 8’ wide public lateral access, an 8’ undeveloped buffer, and an 8’ wide floating dock. Though the new development will not directly cover the entire surface area of water, it will hem-in the entire area where eelgrass is currently growing generally west of the bulkhead and revetment. Even though the area of eelgrass loss with any individual project may be relatively small, the cumulative impacts and fragmentation of eelgrass beds may be significant along highly developed shorelines such as Morro Bay. There is no data to suggest that eelgrass once colonized the entire western shoreline of



the bay, though anecdotal evidence suggests it may be true. In virtually all shallow locations along the shoreline where there is minimal disturbance from development and adequate exposure to sunlight, there appears to be eelgrass growing. It may that these small fragmented patches are remnants from larger continuous beds that once thrived prior to development of the harbor. However, since historic data on the extent of the eelgrass beds in Morro Bay does not exist, this cannot be verified. Nonetheless, it is a fact that eelgrass within the Morro Bay estuary and elsewhere in California is on the decline.

Coastal Act Section 30230 requires that marine resources be maintained, enhanced and restored. The proposed project represents redevelopment of an existing permitted structure in the same general location and footprint as the existing structures but with additional coverage for public lateral access boardwalk and an expanded floating dock. As noted above, shading of eelgrass in the developed harbor and bay is leading to both individual and cumulative adverse impacts on this valuable resource. In this particular instance, the proposed expansion of the public lateral access boardwalk and floating dock will result in covering or shading of 1,000 square feet of intertidal mudflat and potentially some small portion of two significant beds of eelgrass growing within this area. Additionally, shading can be expected to occur from boats mooring alongside the proposed new floating dock.

The mapped eelgrass beds appear to occupy the mudflat just offshore of the existing development west of the bulkhead and revetment. As noted above, the applicant submitted a revised project that attempts to address marine resource concerns and avoid impacts to the identified eelgrass. The applicant eliminated the request for an expanded outdoor dining patio and is proposing instead to enclose and develop the area between the two observation decks for additional dining space, with construction of the public lateral access directly off the redesigned observation decks. This will reduce the potential impacts to eelgrass to a large measure because the access will be located adjacent to the eelgrass beds not over them as originally proposed. During some portion of the day, however, it can be expected that the decking will cast a shadow over the eelgrass beds. The applicant's proposal uses decking made of pre-cast concrete that would be dropped into place with a crane. The concrete will not allow light to pass through and thus some amount of shading of bay waters will occur. As noted above, shading may be the single biggest factor in eelgrass decline.

To mitigate the impacts caused by installation of the public access boardwalk and associated shading of bay waters, the applicants will be required to use translucent decking materials such as fiberglass grid decking. Fiberglass grids are being used elsewhere in an attempt to minimize impacts to eelgrass by allowing light to penetrate through the decking material and reach the eelgrass habitat below. Loss of light is the primary cause of eelgrass retreat in most development involving placement of structures in and over coastal waters. This new technology shows promising results, though the efficacy of fiberglass grids is not yet fully understood. Accordingly, the applicant will be required to monitor the development site on an annual basis to determine if the fiberglass grid decking is providing enough light to promote continued growth of the eelgrass at this location or is causing shading impacts that result in further retreat of the eelgrass. If the fiberglass grid technology is not successful, the Applicant will be required to participate in a coordinated corrective mitigation effort or private individual mitigation for eelgrass impacts.



Special Condition 3 requires the applicant to submit for Executive Director review and approval a choice of alternative construction materials such as a fiberglass grid deck surface that will permit a sufficient amount of light to penetrate the surface of the access decking and promote continued eelgrass survival. In addition, special condition 3 will also require the Applicant to annually monitor the location and extent of eelgrass beneath and adjacent to the project. If the monitoring finds that the eelgrass bed has been adversely impacted by the project, the permittee will be required to participate in a coordinated corrective mitigation effort (i.e., restoration) with the Harbor District, National Estuary Program, or National Marine Fisheries Service. If at such a time there is no formal established coordinated mitigation effort, the Applicant will be required to provide an individual compensatory mitigation contribution.

As currently proposed, the existing gangplank and dock will be replaced by a larger floating dock that will tie into the existing facilities to the south at the Boatyard. The proposed wood floating dock will have a larger footprint and extend across nearly the entire width of lease site 90 west, and in order to make the connection to the Boatyard, it will extend over a portion of lease site 89 west as well. Because of the additional size (640 square feet) it will cover 150% more area than the existing dock (248 square feet) and require a minimum of 4 new structural pilings for mooring. The new dock will be installed in approximately the same location as the existing dock facility (i.e., directly adjacent to the identified eelgrass beds). Eelgrass surveys indicated that the main concentration of grasses was occurring in shallower water generally landward of the existing dock, but that there were stems growing in close proximity to the dock. The applicants propose placing the dock in a similar location to avoid direct coverage of eelgrass, though it may not be possible to entirely avoid impacts to the eelgrass. The floating dock will require installation of pilings to secure it and those pilings will ultimately be directly in or very near the eelgrass. This raises concerns that the new pilings, expanded footprint, and additional boat mooring will result in increased shading and direct disturbance of the eelgrass habitat. As proposed, the placement of the new floating dock will not adequately avoid/minimize the additional shading impacts that may be expect to occur with the proposed expansion of the floating dock.

The surveys also noted that the eelgrass was growing in two distinct patches separated by the area beneath the existing gangplank. It was thought that shading caused by this structure was precluding eelgrass colonization and growth. Removal of the existing gangplank as proposed, will allow sunlight to penetrate this area and provide an opportunity for the eelgrass patches to grow together into one large eelgrass bed. This will provide some measure of mitigation for the loss of habitat associated with the installation of the pilings, but again if shading from the expanded dock and boats replaces the shading that occurred from the gangplank, there will be no net gain. It is possible that the proposed improvements could result in a potentially even greater loss. For these reasons, the Commission is recommending Special Condition 3 that requires the width in the floating dock be reduced to 4 feet and the dock relocated to the seaward extent of the lease site. Moving the dock further seaward into deeper water will provide an additional buffer between the dock and eelgrass habitat and allow more light penetration to the seafloor below. City harbor staff informs us that there is adequate room between the lease site boundary and the navigation channel. Also, a four-foot width is consistent with the harbor's standard design criteria for floating docks and is adequate to provide a walkway to and from boats moored offshore.



d. Conclusion

As designed and conditioned to avoid and mitigate impacts to eelgrass beds and to minimize disturbance of resident wildlife, no significant disruption of marine resources will result. With the inclusion of mitigation measures designed to prevent adverse impacts from construction activities, and to protect essential fish habitats and resources of the marine environment, the project conforms to the marine resource protection requirements of Coastal Act Section 30230.

3. Public Access and Recreation**a. Issue**

Coastal Act Section 30604(c) requires that every coastal development permit issued for any development between the nearest public road and the sea “shall include a specific finding that the development is in conformity with the public access and public recreation policies of the Coastal Act.” The proposed project is located seaward of the first through public road and is adjacent to Morro Bay. The project includes conversion of existing public access to non-access uses, extinguishment of vertical access, and new public access improvements including an eight foot wide lateral public access boardwalk along the entire 50’ width of bay frontage. These public access improvements are intended to improve and increase the visitor-serving uses and recreational opportunities available at this location and provide an important link in the plan for continuous shorefront access along the Embarcadero.

b. Relevant Regulatory Policies

Coastal Act Sections 30210 through 30213, and 30220 specifically protect public access and recreation. In particular:

Section 30210: In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211: Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212(a): Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...

Section 30213: Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...

Section 30220. Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.



Additional Coastal Act policies that provide for maximizing public access and recreational opportunities include Section 30251 regarding the protection of scenic views (see Visual Resources finding below).

The relevant LCP policies related to public access are:

Policy 1.20. *In reviewing the development proposals along the bayfront, the City shall apply the following standards and make the necessary findings to assure consistency with LUP and Chapter 3 Coastal Act policies:*

(5) Later access may be achieved in the following manner:

a. In the form of open or enclosed walkways a minimum of 8 feet wide across the bayward side of the proposed development.

Policy 1.21. *The City shall require provisions of vertical access to the bayfront. Requirements for vertical accessways may be modified so as to provide adequate vertical access in the area (i.e., minimum of one every 300 feet and/or every street hub) linking the vertical accessways with lateral access provisions along the bayward sides of structures where feasible.*

Policy 1.26. *Lateral public access along the waterfront revetment shall be provided in all new development, rehabilitations, or addition projects consistent with Policy 1.20...*

c. Analysis of Public Access and Recreation

Morro Bay provides public access and recreational opportunities of regional and statewide significance. The original project approved by the Commission included two public observation decks overlooking Morro Bay and a public vertical access running the length of the lease site from Embarcadero Road to the observation decks. Unfortunately at the time, there was no requirement that lateral access connections be constructed when lateral access became available on adjoining properties. Hence, the approval did not and could not provide for continuous lateral access along the waterfront. The public observation decks were semi-enclosed with walls and bay windows but no roof. Access to the observation decks was obtained through the vertical access corridor and outdoor seating area of the take-out café. Over time as the café business grew, so too did the need for additional seating. At some point in the mid-1990's, the observation decks were converted to outdoor dining space and locks installed on the doors of the vertical access corridor in direct violation of the terms of the Coastal Development Permit. These violations occurred prior to the current applicant obtaining the lease for this site.

The current applicant has submitted an application for an after-the-fact amendment to the original Coastal Development Permit 3-93-017 to retain the changes in use brought about over time. As mitigation for the loss of vertical public access and the two viewing decks, the applicant is proposing a public lateral access boardwalk, 8' wide along the entire bay frontage of the lease site with a connection to the adjoining lease site to the south. The public lateral access furthers the City's Local Coastal Land Use Plan goals of providing lateral public access all along the waterfront, though it is not entirely consistent with Coastal Act and LCP policies. The relevant policies require and/or strive for continuous lateral access along the waterfront and the applicant's proposal does not include a plan for connecting



with the adjoining lease site to the north. Accordingly, Special Condition 2d requires the applicant to submit revised plans showing the 8 foot wide public lateral access with connections to both adjoining properties (i.e., Galley Restaurant and Boatyard). As conditioned, the project will provide lateral access continuity along a significant stretch of the Morro Bay waterfront and a segment of the California Coastal Trail, as identified in the Coastal Trail working group report to the Legislature, January 31, 2003. The loss of vertical access through the property is not considered significant because adequate vertical access is located on the adjacent lease site (Galley Restaurant) and the Harbor Street end –less than 100 feet from the proposed project.

Though technically consistent with the access provisions of the City's certified LCP, the City approval (CUP 28-02) includes lateral public access improvements on this filled state tidelands site, but falls short of requiring said improvements as a condition of the permit. Condition 1 of the city's standard conditions indicates that the permit is granted for the project depicted on the plans shown in an exhibit to the staff report and held on file with the Public Services Department. Site development, including all buildings and other features, are required to be located and designed in substantial conformance with the aforementioned exhibit unless otherwise specified in the permit. Granted, the staff report exhibit and submitted plans do identify lateral public access improvements to be built on site, along with many other structural improvements approved by the City. However, once the permit has been issued, there is no guarantee that the improvements will be constructed, and the access amenities open and protected for public use for the life of the project. And though it is inferred that the public access improvements are required as mitigation for development impacts, the improvements are not directly linked to (i.e., required by) the conditions of approval. Accordingly, the City approved project cannot be found consistent with the Public Access policies of the Coastal Act.

In order to maximize public access and recreational opportunities and bring the project into conformance with Chapter 3 of the Coastal Act, the project is conditioned to require the lateral public improvements identified on the project plans along with a requirement that the accessway be available for pedestrian access and general public use 24 hours a day, 365 days a year. Special Condition 4 requires the access improvements to be constructed in substantial conformance with the revised plans and be constructed in the first phase of the project, within 180 days of Commission permit issuance. Special Condition 4 also requires that the entire width of the boardwalk be used exclusively for pedestrian access and general public use, 24 hours each and every day, and require signing consistent with Commission/Conservancy standards for public access. Special Condition 6 requires that the applicant satisfy all conditions of approval within 180 days of Commission issuance of this permit. Compliance with special Conditions 4 and 6 will result in the resolution of the outstanding Coastal Act violation.

As conditioned, the proposed project is consistent with the access policies of the Coastal Act that require new development to maximize access and specifically to provide lateral access.

d. Conclusion



As proposed and conditioned by this permit, the project provides and enhances public access opportunities consistent with Coastal Act Sections 30210 - 30213, 30220 and the access policies of the certified LCP. Therefore, as conditioned to ensure that the public access improvements to and along the site are constructed and maintained in perpetuity for pedestrian access and general public use, the proposed project will maximize public access consistent with the public access and recreation policies of the Coastal Act.

4. Visual Resources

a. Issue

The project involves demolition of existing structures, and construction of new structures (including an outdoor dining patio, a new lateral public access boardwalk, and a floating dock) that may change the visual aspects of the project area.

b. Relevant Regulatory Policies

Coastal Act Section 30251 requires that:

Section 30251. The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

Additionally, Coastal Act Section 30253(5) states that:

Section 30253(5). Where appropriate, protect special communities and neighborhoods, which, because of their unique characteristics, are popular visitor destination points for recreational uses.

c. Analysis of Visual Resources

The City of Morro Bay is located on the central coast of California about halfway between San Francisco and Los Angeles. It is a working fishing village situated right in the middle of Estero Bay. The City's certified LCP characterizes the visual resources as "unique" and of "spectacular visual quality," including views of the bay, sandspit, Morro Rock, the Duke Energy Plant, and a picturesque collection of commercial fishing and recreational boats. The LUP describes Morro Rock as "the landmark of the community" and "the most significant visual feature of the area." The visual resource that appears to attract the most public attention in Morro Bay is the developed "harborscape" of the Embarcadero, with its great variety of piers, commercial fishing docks, weathered wooden buildings, retail shops, restaurants and its many different vessels of all descriptions. The Embarcadero is *the* major



tourist attraction of the community and a prime coastal visitor-serving destination with an estimated 1.5 million visitors annually.

The flat site lies between the bay and Embarcadero – a public road. The site is currently developed across most of its entire 50' width with a single-story retail and restaurant building. At this time views to the bay, sandspit, and Morro Rock are primarily available only from inside the observation decks occupied by the Otter Rock Cafe. There is a small peek through the site in the area of the prior vertical access. The applicants are not proposing any structural improvements that would impair this view to the bay.

The City approved design includes construction of an eight-foot wide lateral public access boardwalk across the entire 50' width of bay frontage. (Please see Exhibit 4) The boardwalk will provide the public with unobstructed views of the bay, sandspit, and Morro Rock, and is consistent with the City's policies to provide visual and pedestrian access along the Embarcadero shoreline in all new requests for bayside development. Access to the proposed boardwalk from Embarcadero will be via an existing vertical access sidewalk at the foot of Harbor Street and possibly through the 18' view corridor between the Otter Rock Café and Galley Restaurant.

The visual character of the boardwalk decking itself may introduce some visual impacts because the alternative decking materials offer a different look than traditional wooden decking. The decking is similar to traditional decking in that it has a very small profile and thus is not likely to be very visible even from the bay itself. It will definitely be visible to persons walking directly upon it, but any minimal visual or aesthetic intrusions/impacts associated with the alternative decking materials is more than offset by the marine resource protection benefits it offers. And in fact, it may offer pedestrians small glimpses of the bay below.

Another aspect of the project that may introduce visual impacts is the proposed pilings and grade beam foundation feature. As mentioned in the Fill of Open Coastal Waters findings above, a minimum of four grade beams would be exposed between the floating dock and the public lateral access boardwalk. As proposed, the exposed grade beams will degrade the scenic quality of views to and along bay as seen from the public lateral accessway, and cannot be found consistent with Section 30251 of the Coastal Act. Special Condition 2d requires the applicant to revise the project and remove the grade beam foundation from the plan. The public lateral accessway will be cantilevered over the bay and the potential visual impacts eliminated.

d. Conclusion

Coastal Act Policy 30251 requires new development to protect views to and along the shoreline, be visually compatible with the character of the area and, where feasible, to restore and enhance visual quality in visually degraded areas. As discussed in the preceding paragraphs, the proposed project includes a boardwalk across the entire bayside frontage that will provide unobstructed views for the public to and along the Morro Bay shoreline. Additionally, the existing view corridor through the site will continue to provide peeks to the bay and sandspit and serve to break up the mass of the buildings along the Embarcadero. As conditioned to cantilever the public lateral access over the bay and remove



the grade beam foundation from the project, the design of the proposed project can be found compatible with the surrounding maritime development along this portion of Embarcadero and will restore visual quality on the currently unattractive site. The project, as conditioned by the City and the Commission herein is, therefore consistent with the policy direction of PRC Section 30251.

5. Water Quality

Section 30231 of the Coastal Act requires that water quality be protected and, if possible enhanced by controlling storm water runoff and minimizing entrainment.

a. Relevant Regulatory Policies

Coastal Act Section 30231 provides:

Section 30231

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

b. Analysis

The site is located immediately adjacent to and over the waters of Morro Bay. Construction activities associated with the development of the site and drainage and run off from the completed project could potentially result in adverse impacts on Morro Bay water quality. In particular, those activities include the remodeling of existing waterfront structures (observation decks), removal of gangplank and existing floating dock, construction of a new public access deck, new piling installation and construction of a new floating dock. Since the project requires work in, over, and adjacent to open coastal waters, which could lead to potential adverse water quality impacts, a number of BMPs have been proposed by the applicant to prevent fouling of coastal waters. In addition, the City attached a number of conditions to its permit CUP 28-02 to address this issue. (Please see Conditions 15, 16, 17, and 19, City Council Action on CUP 28-02, January 13, 2004) These proposed BMPs and permit conditions require the following measures to be implemented to ensure that water quality will be adequately protected:

- Installation of an oil/water separator at all surface-water inlets,
- direct all run off to the street rather than the bay,
- implementation of siltation and sediment control measures during construction,
- avoidance of use of the west side of the site closest to the bay for stockpiling of soil, and



cleaning and refueling of equipment,

- on site storage of absorbent materials for use in the event of a fuel spill during construction., training for construction workers in how to contain a spill
- periodic review of the implementation of mitigation measures by a qualified biological monitor
- daily removal and containment of all trash and debris during construction
- use of a floating boom and netting to collect/contain scraps and floatable debris in construction area
- procedures for concrete work to avoid contamination of coastal waters

As project construction will be of limited duration, and construction methods have been either proposed or conditioned by the City's permit to require use of best management practices to avoid oil spills and construction materials from entering the water, the project is not expected to adversely affect water quality or any other aquatic or marine mammal species. The City's approval of the project also includes incorporation of mitigation measures identified in the approved mitigated negative declaration, adopted as part of the project, that provide improvements to the existing drainage system on-site, including the use of oil/water separators and sediment traps to ensure that storm water runoff from the parking lot and the rest of the project does not adversely affect water quality in the surrounding bay. In order to fully take advantage of these proposed measures, Special Condition 7 is attached to require that all special conditions of the City's permit be incorporated into the conditions and requirements of this Coastal Development Permit.

c. Conclusion

As proposed by the applicant and conditioned by the City and incorporated into this recommendation, the construction and use of the proposed development will not adversely affect water quality of the bay and is therefore consistent with Coastal Act Section 30231.

6. Violation

Unpermitted development occurred on the subject parcel prior to submission of this permit application consisting of the conversion of public observation decks to outdoor dining and the elimination of public vertical access through the site. The applicant asserts that the intensification and change in use occurred prior to his purchase of the property (lease), but nonetheless, is committed to clearing up the Coastal Act violation within the context of this Coastal Development Permit amendment. As noted above, the project proposal includes conversion of and improvements to the existing public observation decks, which will heretofore be used as additional dining space for the Otter Rock Café. In addition, the applicant proposes to permanently extinguish the public vertical access through the property, as adequate public vertical access is readily available nearby. As such, the applicant requests after-the-fact approval for the unpermitted development described above and located at 885 Embarcadero Road, lease



sites 90 & 90 west, in the incorporated city limits of Morro Bay. This permit amendment addresses the unpermitted development, as well as the new development proposed in the subject application. Special Condition No. 4 requires that the applicant to construct an 8' wide public lateral access boardwalk across the entire lease site with connections to adjoining properties. In order to ensure that the matter of unpermitted development is resolved in a timely manner, Special Condition No. 6 requires that the applicant satisfy all conditions of this permit, which are prerequisite to the issuance of this permit within 180 days of the issuance of the Coastal Development Permit, or within such additional time as the Executive Director may grant for good cause.

Consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Review of this permit does not constitute a waiver of any legal action with regard to the alleged violation nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit.

IV. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. The Coastal Commission's review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. This staff report has discussed the relevant coastal resource issues with the proposal, and has recommended appropriate mitigations to address adverse impacts to said resources. Accordingly, the project is being approved subject to conditions that implement the mitigating actions required of the Applicant by the Commission (see Special Conditions). As such, the Commission finds that only as modified and conditioned by this permit will the proposed project not have any significant adverse effects on the environment within the meaning of CEQA.

